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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of THOMAS TODD and
CONCETTA LOMBARDI.

THOMAS TODD,

Appellant,

v.

CONCETTA LOMBARDI TODD,

Respondent.

D053841

(Super. Ct. No. D486517)

APPEAL from a judgment of the Superior Court of San Diego County, Marc P. Kaplan, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

In this marital dissolution proceeding, the court resolved numerous property and spousal support disputes between former spouses Thomas Todd and Concetta Lombardi. On appeal, Thomas challenges two of the court's rulings: (1) the court's determination that Concetta was entitled to \$38,271 based on her monetary contribution to the purchase

of property held in Thomas's name; and (2) the court's spousal support order requiring Thomas to pay Concetta \$2,500 per month for 25 months. We conclude Thomas's contentions are without merit, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Thomas and Concetta were married on July 4, 2000. At the time, Thomas was in his early 50s and Concetta was in her late 40s. Thomas was an experienced engineer and president of his own engineering company. Concetta had previously worked in advertising.

Each party owned real property purchased before the marriage. Shortly before their wedding, Thomas asked Concetta to sign a prenuptial agreement, and Concetta declined. But the parties agreed each spouse would prepare a list of his or her separate property and each property's value, and the parties would sign both lists. The parties then prepared and signed the lists on June 29, 2000 (Separate Property lists). They were married several days later.

Four years later, in 2004, Thomas filed for divorce. The parties then had numerous disputes over property division and spousal support issues. In August 2005, the court (Judge David Oberholtzer) held a bifurcated hearing on the issue of the validity of claimed prenuptial agreements. After the hearing, the court found the Separate Property lists did not constitute a prenuptial agreement and there were no other prenuptial agreements. But the court found the Separate Property lists established "prima facie evidence of the assets and valuations [of the separate property] as of June 29, 2000 [and] the burden of proof is upon the party contesting the valuation and characterization of any

assets . . . to produce evidence and persuasion to overcome the valuation and characterization of the assets in those documents."

The parties stipulated that the remaining issues would be decided by Pro Tem Judge Marc Kaplan. After a seven-day evidentiary hearing, the court issued a 51-page statement of decision explaining its ruling on each of the disputed issues. Each party then filed objections to the statement of decision. In response, the court clarified its decision on some of the issues. The court then issued a lengthy final statement of decision and final judgment. The relevant portions of the evidence and rulings will be discussed below.

DISCUSSION

I. *Cove Property*

Thomas first contends the court erred in determining that Concetta had a beneficial interest in Thomas's separate real property purchased before the marriage, known as the Cove property.

A. *Relevant Factual Background*

In May 1999, Thomas and Concetta were living together. In an unplanned event, Concetta walked into the sales office of a new home development, and signed a contract to purchase a home that had not yet been built (the Cove property). As part of this contract, she gave the developer a \$5,000 deposit check. When Concetta returned home, she told Thomas about this purchase. Thomas was surprised, but soon agreed the home might be a good place for the couple to live. Thomas brought his father and stepmother

to the model home in the development, and they congratulated the couple and said how beautiful the home would be.

The Cove residence took about six months to build. During the construction, Concetta was substantially involved in the design decisions, and Thomas was involved in other construction issues, such as locating electrical outlets.

By the time escrow was about to close in November 1999, Concetta was short on cash and available credit because she had mortgages on two other investment properties. Thomas and Concetta discussed the purchase and decided it would be better for Thomas to obtain the loan for the Cove property. To accomplish this, Thomas entered into an agreement with the developer and opened another escrow in his own name. Concetta then transferred her \$5,000 deposit from her escrow account to Thomas's escrow, and Thomas added funds to the deposit. Escrow closed in January 2000. The total purchase price was approximately \$443,000. Thomas took title to the property in his own name. Concetta testified that she understood the two were buying the property together.

About six months later, when the couple signed the Separate Property lists, the Cove property was on Thomas's list. Shortly after, Thomas and Concetta married.

Two years later, in August 2002, Thomas refinanced the property. The loan was in Thomas's sole name. As part of this refinancing, Concetta executed an interspousal transfer deed. The parties separated two years later, in September 2004.

In May 2005, Thomas sold the Cove property for \$825,000. The parties thereafter disputed whether Concetta was entitled to any portion of the revenue generated from the sale. This dispute was one of the issues before Pro Tem Judge Kaplan. During those

proceedings, Concetta claimed a percentage interest in the property under a resulting trust theory based on her \$5,000 deposit. Thomas countered that the resulting trust doctrine was inapplicable, relying on the presumption of title, his Separate Property list, and the 2002 interspousal transfer deed.¹

After considering the evidence and arguments, the court agreed with Concetta's position. The court made a factual finding that the \$5,000 down payment reflected Concetta's "investment" in the property, and she was therefore entitled to a pro rata ownership of the property under a resulting trust theory. With respect to the amount, the court found the total down payment was \$47,122.43, of which \$5,000 was paid by Concetta and \$42,122.43 was paid by Thomas. The court thus found that Concetta "has a pro-rata interest of $\$5,000/\$47,122.43$ times the proceeds received of \$360,676.01 for an interest of \$38,271." The court awarded Concetta \$38,271. In awarding this amount, the court found Judge Oberholtzer's ruling was not controlling because neither party raised the \$5,000 deposit issue in the prior proceedings.

B. *Analysis*

Thomas contends the evidence was insufficient to support the court's award of \$38,271 based on a resulting trust theory.

A resulting trust arises "[w]hen one person furnishes the money . . . with which property is acquired and title to the property is taken in the name of another" (*In re*

¹ Thomas initially denied that Concetta had given him the \$5,000, but when presented with written evidence of this transfer, he admitted this fact. The court found Thomas's initial denials on this issue to be "deeply disturbing."

Marriage of Becker (1984) 161 Cal.App.3d 65, 75; accord *In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 342; *Martin v. Kehl* (1983) 145 Cal.App.3d 228, 238; see 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 311, p. 885.) "[A]bsent the intention of the one to confer a gift upon the other, the titleholder is a trustee upon a resulting trust of the property for the benefit of the person who furnished the money or other thing of value by which the property was acquired. [Citations.]" (*In re Marriage of Becker, supra*, 161 Cal.App.3d at p. 75.) "Where only a portion of the acquisition price has been furnished, a resulting trust may be established in a fractional interest in the property on a *pro tanto* basis. [Citations.]" (*Ibid.*) "'A resulting trust is implied from the facts, and neither written evidence of an agreement nor a fraud on the part of an alleged trustee is essential to its existence.'" (*Jones v. Gore* (1956) 141 Cal.App.2d 667, 673.)

The party seeking to impose a resulting trust "has the burden of proving the facts establishing his [or her] beneficial interest by clear and convincing evidence." (*Gomez v. Cecena* (1940) 15 Cal.2d 363, 366-367.) But the "proof may be indirect," consisting of the parties' conduct and the circumstances underlying the transaction. (*Rowland v. Clark* (1949) 91 Cal.App.2d 880, 882-883.) On appeal, we review the court's ruling under the substantial evidence standard. (*In re Marriage of Ruelas, supra*, 154 Cal.App.4th at p. 345; *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.) "Whether the evidence to prove the existence of a [resulting] trust is clear, satisfactory and convincing 'is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.'" (*Viner v. Untrecht*

(1945) 26 Cal.2d 261, 267, accord *In re Marriage of Ruelas*, *supra*, 154 Cal.App.4th at p. 345.)

Applying these principles, we conclude there was substantial evidence to support the court's imposition of a resulting trust in this case. The evidence was undisputed that Concetta had contributed \$5,000 of her separate property funds to pay for a portion of the deposit used to purchase the Cove property. There was no evidence that she intended the deposit as a gift or an advancement. The evidence also supports that Thomas understood that Concetta viewed her transfer of funds as an investment in the property. Although Concetta first signed a contract to purchase the property on her own, the parties thereafter made a joint decision for Thomas to open his own escrow account and have Concetta transfer the down payment into that escrow as the best method for financing the purchase of the property. After this decision, Concetta remained actively involved in numerous aspects of the purchase and ownership of the home. These circumstances present a classic case for the imposition of a resulting trust. (See *Madsen v. Madsen* (1917) 35 Cal.App. 487, 490 [upholding a resulting trust where father furnished a portion of funds for son to purchase property for their joint use where neither party intended the funds "to be a loan, gift, or advancement . . ."].)

Thomas contends the court's finding was unsupported because there was no evidence of any "discussion or agreement" regarding the \$5,000, and therefore the presumption that the legal title owner owns the full beneficial interest in title was not overcome. (See Evid. Code, § 662.) This argument reflects a misconception of the governing law.

A resulting trust is known as an "intention-enforcing" trust, and is implied by law where necessary to carry out the inferred intent of the parties to a particular transaction. (See *Majewsky v. Empire Constr. Co., Ltd.* (1970) 2 Cal.3d 478, 487; *Martin v. Kehl*, *supra*, 145 Cal.App.3d at p. 238.) But this does not mean that the party seeking to impose a trust must present evidence of a specific agreement between the parties. Instead, the law *presumes* a trust arises under circumstances where a person furnishes money for the purchase of real property with the manifested intent to retain an interest in the property, but another person takes title to that property. (See *In re Marriage of Ruelas*, *supra*, 154 Cal.App.4th at p. 342; *Martin v. Kehl*, *supra*, 145 Cal.App.3d at p. 238.) Once the party claiming a resulting trust has met this initial burden by clear and convincing evidence, a resulting trust arises and the burden of presenting evidence shifts to the holder of the property's legal title to rebut the presumption of the resulting trust by showing the payment was for a purpose other than to create a beneficial interest, such as to make a gift. (*Ibid.*; see *Majewsky*, *supra*, 2 Cal.3d at pp. 485-486; 13 Witkin, Summary of Cal. Law, *supra*, Trusts, § 311, p. 885 ["a resulting trust . . . arises by operation of law, without an expressed intent"].)

In this regard, we find unavailing Thomas's reliance on language in *American Motorists Ins. Co. v. Cowan* (1982) 127 Cal.App.3d 875, for a rule that one party's "unilateral" intent cannot serve as the basis for the imposition of a resulting trust. (*Id.* at p. 885.) The *American Motorists* court made this statement in explaining its holding that an insurer was not entitled to rely on a resulting trust theory to obtain a return of funds paid to an injured party with whom the insured entered into an enforceable settlement

agreement. This holding is inapplicable here. Moreover, unlike *American Motorists*, in this case it was not Concetta's unilateral intent that created the resulting trust, rather it was this intent and the circumstances showing Thomas understood the money was not a gift or advancement.

We also reject Thomas's argument that no resulting trust could arise because Concetta paid the \$5,000 deposit to the developer without his knowledge. Concetta's initial deposit was not the event that triggered the resulting trust. Rather, it was the fact that Concetta then transferred this money to Thomas, with whom she was living, as part of the down payment on a home that the couple agreed would be placed into Thomas's name for purposes of obtaining the loan.

Thomas alternatively contends that even if a presumption of a trust arose from Concetta's \$5,000 investment, he rebutted this presumption with evidence of Concetta's subsequent action in signing the Separate Property lists that identified the Cove property as Thomas's separate property, and in executing the interspousal deed. However, substantial evidence supports the court's conclusion that these actions did not reflect an intent to eliminate Concetta's beneficial rights in the property.

With respect to the Separate Property lists, Judge Oberholtzer ruled that the lists created a rebuttable presumption that the properties identified on each list were held as separate property. However, the fact that the Cove property was "separate property" did not preclude a finding that Concetta had a beneficial interest in a portion of the property. A resulting trust is a remedy that applies specifically to property on which another has legal title. The Separate Property lists confirmed the parties' understanding as to the

character of each parcel of property, but did not constitute an agreement that Concetta was intending to forfeit her claim of a beneficial interest in this separate property based on a resulting trust theory.

We reach a similar conclusion with respect to the Concetta's execution of the 2002 interspousal deed. Thomas cites Family Code section 850, which provides that married persons may by agreement, with or without consideration, transmute community property to separate property. However, the trial court had a reasonable basis to find Concetta was not intending to negate her beneficial interest in the property by signing the 2002 deed. Although Concetta's execution of the deed established that she transferred all legal interests in the property, it does not necessarily show she intended to forgo or cancel her right to enforce an equitable resulting trust *against Thomas* for the benefits received by him.

Thomas's reliance on *Estate of Bibb* (2001) 87 Cal.App.4th 461 is misplaced. In *Estate of Bibb*, a husband signed a deed stating he "grant(s)" his separate property interest in a parcel of real property to himself and his second wife, as joint tenants. (*Id.* at p. 468, fn. 3, 464-465.) The conveyance was motivated by the husband's desire to obtain a secured loan based on his wife's credit. (*Id.* at pp. 464-465.) After the husband died, his son challenged the conveyance, stating the deed did not contain language expressly stating that the characterization of the property was being changed. (*Id.* at p. 465.) The court rejected this argument, finding the word "grant" was sufficient for a valid transmutation because it is the "historically operative word for transferring interests in real property." (*Id.* at pp. 468-469.)

We agree that the language in the *Bibb* deed was sufficient to change the legal characterization of the property from separate property to joint tenancy. But this principle is inapplicable to the legal issue here. The *Estate of Bibb* court did not consider the question of the enforceability of a resulting trust. The sole issue raised here is whether a court has the equitable authority to enforce a resulting trust based on the intentions of the parties, despite the intervening execution of an interspousal deed. The court found the enforcement of the trust was consistent with the parties' intent, and the trust was necessary to avoid Thomas's unjust enrichment. The fact that Concetta signed an interspousal deed as a condition of Thomas's refinancing (and for Thomas's benefit) does not preclude the enforcement of the resulting trust in this case.

Although the court could have reached different factual conclusions as to the effect of the Separate Property lists and the 2002 interspousal deed, we are required to draw all factual inferences supporting the court's conclusion. (*In re Marriage of Ruelas*, *supra*, 154 Cal.App.4th at p. 344.) On our review of the entire record, the evidence supports the court's imposition of a resulting trust on the Cove property in the amount of \$38,271.

II. *Spousal Support*

Thomas also challenges the spousal support order requiring him to pay Concetta \$2,500 per month for 25 months. Thomas contends the award constitutes an abuse of discretion because: (1) the award was based on a finding that Thomas could earn \$125,000 per year, and there was insufficient evidence to support this finding; and (2) the

court's ability-to-earn finding was based on the judge's own background knowledge, rather than on the evidence. These contentions are without merit.

A. Relevant Facts

The evidence presented at the March 2006 trial showed that Thomas has an electronic engineering degree from the San Diego College of Engineering, and has taken some classes towards a master's degree. From 1968 through 1978 he worked for Teledyne MicroJoin. For the next three or four years, Thomas was employed by Cubic Corporation as a project manager, and then worked for another entity as a consultant. In 1982 or 1983, Thomas began his own business, ToddCo General Inc. (ToddCo), which performed "hot-bar soldering" and other electrical-type work.

Thomas later transferred title of his business to his father in return for his father's assumption of certain debt, but Thomas always remained in control of the company. By 1998, Thomas had built a successful business with 25 employees. In 1998, another entity purchased ToddCo's assets, and Thomas continued working for this entity as president, earning \$135,000 during the next two years. Thomas continued to work for ToddCo during the first two years of the marriage. In 2002, Thomas earned \$125,000 plus bonus and profit sharing/retirement.

Shortly after, this company moved its business overseas and Thomas was precluded from continuing his own business based on his noncompete agreement. During the next several years, Thomas obtained loans and other benefits from ToddCo to support the couple's upper middle class lifestyle, which included the use of a yacht, expense accounts and an ability to use the corporation as his personal bank account. At

the hearing, Thomas testified that ToddCo was still in existence, but he was not earning any revenue from this business, except for using certain assets owned by the business such as the boat where he was living. Other evidence, however, showed that Thomas received continuing income from ToddCo.

At some point shortly before or after the separation in September 2004, Thomas decided to change careers and to work on a boat as a captain or a radio operator. In April 2005, Thomas suffered a severe ankle injury substantially restricting his mobility for six months, and precluding him from working on a boat. Thomas testified that he believed he had colon cancer and other serious diseases, but he did not present any supporting medical evidence. Thomas said that he was not making any plans to return to work, and instead was focusing on "getting back [his] health." He claimed he was not qualified to be an engineer because his engineering skills are "outdated."

At trial, Concetta produced evidence of advertised internet job openings for electrical engineers and related positions. Thomas, however, claimed that his engineering degree is in "electronic engineering" as opposed to "electrical engineering." Concetta testified that Todd had previously told her that an "electronics engineer is a higher degree" than an electrical engineer, and that it is a more specific type of engineering.

At the time of the hearing, neither Thomas nor Concetta were working, and both claimed to have no or very little income. Both sought spousal support from the other.

B. Court's Ruling

After considering all of the evidence, the court found it "disturb[ing]" that "neither [p]arty believes they need to be employed" and that each expects the other to pay spousal

support. The court then found that both parties have the ability and opportunity to earn income, and thus imputed an income to each spouse. The court found Concetta had the ability to earn \$40,000, and Thomas had the ability to earn \$125,000. Based on this imputed income and numerous other factors, including the length of the marriage and the parties' previous "upper middle class lifestyle," the court ordered Thomas to pay \$2,500 per month for 25 months, and ordered this entire amount (\$62,500) due because the award constituted retroactive support from the date of the separation (which was more than two years earlier).

C. Governing Law and Analysis

Family Code section 4320 sets forth numerous factors that a trial court must consider and weigh in deciding an appropriate amount of spousal support. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302.) Of relevance here, these factors include: the supporting spouse's ability to pay; the needs of each party based on the prior marital standard of living; the obligations and assets of each party; the duration of the marriage; the age and health of the parties; tax consequences; the balance of hardships to the parties; the goal that the supported party be self-supporting within a reasonable period of time; and any other factors deemed just and equitable by the court. (See Fam. Code, § 4320.)

In evaluating these factors, a court must consider the equities of the particular case. (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93.) "In making its spousal support order, the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by section 4320, with the goal of accomplishing

substantial justice for the parties in the case before it. . . . "[T]he ultimate decision as to amount and duration of spousal support rests within its broad discretion and will not be reversed on appeal absent an abuse of that discretion." . . . 'Because trial courts have such broad discretion, appellate courts must act with cautious judicial restraint in reviewing these orders.'" (*Ibid.*)

Thomas does not challenge the court's determination of Concetta's earning capacity or that the award reflects the amount necessary to maintain their prior upper-middle class standard of living. Instead, Thomas challenges only the court's finding that he had an earning capacity of \$125,000, emphasizing the evidence showing he was making only \$12.50 per hour or \$150/175 per day while working on boats and making deliveries.

A party's current employment and income are important factors in determining the appropriate spousal support award. But if the court believes the party's actual earning capacity is different than the current circumstances, the court may base its award on the earning capacity figure. (See *Marriage of Ilas* (1993) 12 Cal.App.4th 1630, 1638.) To impute an earning capacity, the court must generally find the supporting party has: (1) the ability to earn consistent with health, age, education, marketable skills and employment history; and (2) available employment opportunities. (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 234.) The opportunity to work is established if the evidence shows a "substantial likelihood" that he or she "could, with reasonable effort, apply his or her education, skills and training to produce income." (*Marriage of Cohn* (1998) 65 Cal.App.4th 923, 930; see *In re Marriage of Simpson, supra*, 4 Cal.4th at pp.

232, 234.) The decision as to earning capacity rests in the trial court's broad discretion. (*Marriage of Simpson, supra*, 4 Cal.4th at pp. 232, 234.)

The court found that Thomas "is an experienced and accomplished engineer with a degree, and has numerous patents to his credit," and that in 1998 through about 2002, he was earning approximately \$125,000 annual income. The court noted that Thomas thereafter voluntarily made a decision that he wanted to work on a boat as a radio operator or as a boat captain, and to earn a substantially lower income. The court also found Thomas's claims that he suffers from several serious diseases (e.g., cancer, heart disease) to be unsupported by credible evidence. The court further noted that Thomas expects to inherit a substantial estate from his stepmother, who recently passed away, but the court recognized that it could not consider this amount in calculating the earning capacity because the inheritance remained only a future expectancy.

In the final statement of decision and judgment, the court reiterated that Thomas's "ability to earn is based on his prior compensation of \$125,000 per year, his former base salary which corresponds to the funds he withdrew fro[m] Todd[C]o during the marriage and access to the corporate assets that will be his on settlement of his stepmother's estate. The \$125,000 is reasonable given the nature of his employment as president of a corporation, patents that were issue[d] and employment experience as well as other general factors."

The court also noted that in 2002, Thomas "earned \$125,000 plus bonus and profit sharing/retirement" and that "[d]uring the marriage, [Thomas's] lifestyle included a yacht, expense accounts and an ability to use the corporation as his personal bank account."

The court further stated that: "Imputing \$125[,]000 per year to [Thomas] is reasonable compensation in the San Diego marketplace for engineers with management experience, and his salary history. The income is also based on the Court's involvement in the San Diego community for over 15 years and substantial experience with business valuations, imputation of income and employment statistics. The Court finds [Thomas's] change from an engineer to making deliveries and working on boats was voluntary elected choice. The Court did not take [Thomas's] inheritance, rental income or accrued executor fees into consideration in calculating spousal support payable to Wife."

In challenging the court's decision, Thomas argues primarily that the evidence of job openings produced by Concetta was inapplicable because there is no showing that Thomas's particular experience with "hot bar soldering" would qualify for any of these positions, particularly because his educational degree is in "electronic engineering," rather than "electrical engineering." However, the court did not rely on the evidence of the specific job openings to conclude that Thomas could obtain a particular job, and made clear that it understood Thomas's background was in "electronic engineering." Instead, the court relied on the evidence of the job openings to reach a conclusion as to the availability of employment in general, together with evidence showing that Thomas had almost 40 years experience in the engineering field, had substantial management experience running his own engineering business, and that his salary before and during the marriage was \$120,000 to \$140,000. Further, the court was aware that ToddCo still has assets, and Thomas has access to at least some of those assets. Additionally, although the court recognized that it was not permitted to base its spousal support award on the

substantial estate Thomas would likely soon inherit, it could properly consider this fact in evaluating the reasons that Thomas did not appear to be concerned with finding a job that would produce income to support his prior lifestyle. On this record, the court did not abuse its discretion in concluding that Thomas could have used his marketable skills to earn at least \$125,000, given his education level and extensive background as a businessman who managed a successful company for more than 15 years.

We reject Thomas's additional argument that the court violated his due process rights because the court relied on its own personal knowledge of employment opportunities and salaries, rather than on the evidence. In support, Thomas relies on the court's reference to the fact that it had "involvement in the San Diego community over the past fifteen . . . years and substantial experience with business valuations, imputing income and employment statistics" Reading this single statement in context of the court's lengthy written rulings, we do not interpret the court's comment as suggesting it based its ruling on facts that were outside the record. Instead, the court was simply noting it was aware of the nature of the local economy and experienced in evaluating business-related issues, and that it was considering the evidence in light of this experience. In exercising its broad discretion to issue equitable spousal support orders, a court is entitled to consider general experience and knowledge to provide context to the presented evidence.

III. *Attorney Fees*

Concetta requests this court order that Thomas contribute to Concetta's attorney fees on appeal, citing Family Code sections 2030 and 271. Because this request raises

factual issues, it is best decided in the trial court. On remand, Concetta may raise the issues in the proceedings below.

DISPOSITION

Judgment affirmed. Appellant is to pay respondent's costs on appeal. On remand, respondent is entitled to raise the issue whether she is entitled to attorney fees incurred on appeal.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.